IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (App., pp. A47-A72) is reported at 469 F. 2d 911. The United States District Court for the District of New Jersey filed no formal written opinion; its oral opinion is set forth at App., pp. 45-46.

JURISDICTION

The judgment of the Court of Appeals (App., pp. 73-74) was entered on November 22, 1972. A timely petition for rehearing was denied on December 20, 1972. App., p. 108. The petition for writ of certiorari was filed on May 19, 1973, and was granted on October 9, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Is the issue of the constitutionality of state welfare assistance to strikers rendered moot by the termination of Petitioners' particular strike, notwithstanding (a) the continuing effect of such assistance upon the Petitioners' future contract negotiations and on-going daily collective bargaining relationships; (b) the continuing availability of such assistance and the likelihood of a recurrent impact on other employers; and (c) the fact that, if considered moot, a significant question of national importance would become inherently evasive of appellate review?

2. Does the state grant of welfare assistance to strikers constitute an impermissible obstacle to the accomplishment and execution of national labor policy?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 and Article VI, Clause 2 of the United States Constitution are set forth at App., p. 109.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. § 141 *et seq.*), New Jersey's General Public Assistance Law (NJSA 44:8-107 *et seq.*), the applicable Department of Health, Education and Welfare and New Jersey Regulations on Payment of Welfare Assistance to Strikers, New Jersey's former Assistance for Dependent Children Law (NJSA 44:10-1 *et seq.*), the Social Security Act of 1935, as amended (42 U. S. C. § 602 *et seq.*), New Jersey's present Assistance to Families of the Working Poor Law (NJSA 44:13-1 *et seq.*) and those portions of New Jersey's Unemployment Compensation Act (NJSA 43:21-1 *et seq.*) excluding individuals participating in a labor dispute from eligibility for such benefits are all set forth at App., pp. 109-140.

STATEMENT OF THE CASE

On May 14, 1971, employees of the Petitioners represented by Respondent Teamsters Local Union 676, in support of their demands for modification of an expired collective bargaining agreement, commenced a strike which was to last for a full six weeks until the employees returned to work on June 28, 1971. After ascertaining that many of the strikers were receiving welfare assistance from the State of New Jersey,[1] the instant suit was filed on June 10, 1971 seeking both declaratory and injunctive relief. The complaint alleged that the availability of such a state subsidization of strikers, by allying the state's economic power on the side of the Union, frustrated the national labor policy of free collective bargaining and thereby contravened the Supremacy Clause of the Constitution.

On June 24, 1971, the District Court, without an evidentiary hearing and notwithstanding the Petitioners' expressed desire to offer testimony in support of their complaint,[2] dismissed the

1. Such payments were being made under New Jersey General Public Assistance, NJSA 44:8-107 *et seq.*, a state program, and Aid for Dependent Children (AFDC), NJSA 44:10-1 *et seq.*, a joint state-federal program. App., pp. 126-132. Effective June 30, 1971, New Jersey elected to no longer to participate in the unemployed parent segment of the AFDC program and enacted, in lieu thereof, its Assistance to Families of the Working Poor program, NJSA 44:13-1 *et seq.*, which also provides benefits to striking employees. App., pp. 132-136.

2. Counsel for the Petitioners, for example, informed the District Court that he was prepared to offer testimony through Dr. Herbert R. Northrup, Director, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, with respect to the various factors concerning the payment of welfare benefits to strikers which were considered critical in *I. T. T. Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir., 1970), *cert. den.*, 402 U. S. 933 (1971), *reh. den.*, 404 U. S. 874 (1971). The Court was further advised that Petitioners were prepared to offer testimony through several state welfare officials as to the number of Petitioners' em-

action under F. R. C. P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted. App., pp. 45-46.[3] An appeal was thereafter taken to the Court of Appeals for the Third Circuit which, on November 22, 1972, in a divided decision, dismissed the appeal as moot with directions to the District Court, on remand, to vacate its order and dismiss for the same reason. App., pp. 73-74. The panel majority, although observing that because " . . . of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this" (App., p. 59), nevertheless concluded that, while this Court's recent pronouncements on mootness in other contexts "perhaps indicat[e] some lessening of the mootness stricture, [they] do not appear to affect the vitality of *Oil Workers* [v. *Missouri*, 361 U. S. 363 (1960),] in a labor contract. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court." App., p. 65. The majority further concluded that the present case was neither encompassed within the doctrine of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911), nor had an "on-going direct effect on appellants". App., p. 60. Judge Gibbons, dissenting, argued that

ployees then on strike who had applied for and were receiving public welfare benefits from the State of New Jersey and the approximate ranges of the monthly benefits being paid. The Court, however, declined to accept such testimony and dismissed the complaint in its entirety on the basis of *I. T. T. Lamp Division*. Petitioners, in a further attempt to place the testimony of Dr. Northrup and their other witnesses before the Court of Appeals, moved the District Court, on July 27, 1971, pursuant to F. R. C. P. Rule 27(b), for leave to take the depositions of said persons. This motion was denied by the District Court on August 24, 1971. App., p. 2. An affidavit of Dr. Northrup who later received and filed with the record in the Court of Appeals. App., pp. 75-108.

3. Since the present appeal arose from a motion to dismiss, and Petitioners sought to adduce evidence below, it is fundamental that all the factual allegations contained in the complaint (App., p. 12) and the motion for a preliminary injunction (App., p. 26) must be presumed to be true. See *Cooper* v. *Pate*, 378 U. S. 546 (1964), and *Perez* v. *Campbell*, 402 U. S. 637, 657 (1971) (separate opinion of Justice Blackmun).

"[t]he issues in this case are of considerable public interest, and likely to recur. Overanxiety on the part of the federal courts to find such cases non-justiciable is not consistent with our judicial obligations." App., p. 71. A petition for rehearing was denied by the Court on December 20, 1972. App., p. 108.

SUMMARY OF ARGUMENT

1. The "current contours" of the mootness doctrine permit resolution of the instant controversy. Respondent State of New Jersey has evidenced no indication that it will change its policy of making welfare assistance available to strikers. Nor is there any indication that there will be a diminution of the significant effect of that assistance on both Petitioners' subsequent negotiations for new union contracts and their on-going daily collective bargaining relationships. There is present in this case, therefore, both the probability of recurrence of the allegedly objectionable action and likelihood of impact on the same objecting litigants required to satisfy the present criteria of mootness. This case is demonstrably one that will be contested with the necessary adverseness and vigor, and with sufficient impact of actuality, to warrant judicial resolution.

The issue of whether state welfare assistance to strikers unconstitutionally insulates one party—the striking union—from the economic disadvantages of a strike is, moreover, a recurrent and important controversy in the federal-state area. It is, furthermore, a question which, because of the relative brevity of strikes compared with the prolonged period necessary to appeal a case to this Court, is truly capable of repetition yet likely to be evasive of review. Such a case, as this Court recognized in *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, 515 (1911), and *Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d 147, 161 (1973), presents a "classic justification for a conclusion of non-mootness." On this ground also, the decision below should be reversed.

2. This Court should resolve the merits of this controversy. Assistance to the lower federal courts is necessary to resolve the widespread litigation of similar questions and afford guidance

to dispel the current uncertainties over state welfare to striker policies. Free collective bargaining is the cornerstone of federal labor policy. This Court has been careful, therefore, to protect that cornerstone against state intrusion. Any application of state law which upsets the balance of power between labor and management expressed in the national labor policy—regardless of the alleged state interest involved—has been prohibited. The grant of state welfare assistance to strikers constitutes precisely such an impermissible state rebalancing of economic power. The state has created a potent weapon which necessarily restricts the desired bilateral freedom of collective bargaining left free by Congress for the operation of economic forces. State welfare assistance to strikers, accordingly, should be declared to be an unconstitutional impediment to federal labor policy.

ARGUMENT

I

THE "CURRENT CONTOURS" OF THE MOOTNESS DOCTRINE PERMIT RESOLUTION OF THE INSTANT CONTROVERSY

The court below, in direct conflict with *Grinnell Corporation* v. *Hackett*, 475 F. 2d 449, 454 (1st Cir., 1973), *cert. den.* 94 S. Ct. 164 (Oct. 9, 1973), held that *Oil Workers* mandates that the present case be deemed moot. This conclusion is based, as shown below, on a misunderstanding of the "current contours" of the mootness doctrine; a failure to recognize the continuing impact of New Jersey's welfare to strikers subsidy on both Petitioners' subsequent contract negotiations and their on-going daily collective bargaining relationships; a misapplication of the "capable of repetition, yet evading review" doctrine of *Southern Pacific;* and a resultant erroneous application of *Oil Workers.*

A. The Evolution of the Mootness Doctrine

Historically, without reference to constitutionally imposed jurisdictional limitations, the federal courts declined, as a matter of discretion, to entertain matters where there "was nothing that the judgment of the Court . . . could have affected" (*Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. at 515 (dictum)) or if "there is no subject-matter on which the judgment of the court can operate." *Ex Parte Baez*, 177 U. S. 378, 390 (1900). These concepts, which sufficed prior to acceptance of the declaratory judgment as a form of relief, were reevaluated after recognition of declaratory judgments as Article III controversies in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937). Jurisdictional issues never before reached were thereafter discussed in terms of the available rubrics in-

cluding mootness.[4] The doctrine of mootness thus evolved into a jurisdictional barrier defined by the controversy requirement of Article III.[5] The probability of recurrence, which had previously operated to qualify the common law mootness doctrine,[6] was subsequently utilized to discern the existence of an Article III controversy. The mootness doctrine in short, converged with Article III limitations; the jurisdictional test henceforth was determined by either "two probabilities—[1] recurrence of the objectionable action and [2] impact on the same objecting litigants" or the "capable of repetition, yet evading review" standard of *Southern Pacific. Committee to Free the Fort Dix 38* v. *Collins,* 429 F. 2d 807, 812 (3rd Cir. 1970); see also *Solien* v. *Miscell. Drivers & Helpers Union Local No. 610,* 440 F. 2d 124, 127 (8th Cir. 1971). These tests insured that each case would be presented in an adversary context and with sufficient "impact of actuality"[7] to preclude the risk of issuing of a speculative or merely advisory opinion.

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4. See Note, *Mootness on Appeal In The Supreme Court,* 83 Harv. L. Rev. 1672, 1676, n. 22 ("retrospective effect, long indispensable to judicial decisions, is no longer required") Compare *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 344, 372 (1910) (Holmes J., dissenting), with *Great N. Ry.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364 (1932), and *Linkletter* v. *Walker,* 381 U. S. 618, 622-29 (1965).

5. The first implication that mootness was a jurisdictional barrier is found in *Aetna,* 300 U. S. at 240. See Note, *Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. at 1676. See also *North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971): "our impotence to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."

6. See, e.g., *Southern Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. at 515; and *United States* v. *Trans-Missouri Freight Association, Inc.,* 166 U. S. 290 (1897).

7. See Frankfurter, *A Note on Advisory Opinions,* 37 Harv. L. Rev. 1002, 1006 (1924). See also Note, *Cases Moot On Appeal: A Limit On The Judicial Power,* 103 U. Penn. L. Rev. 772, 774 (1955).

B. The Present Case Involves Both the Requisite Probability of Recurrence of the Dispute and Adverse Effect on Petitioners

1. The present case fully satisfies the dual objectives of the mootness doctrine. The probability of recurrence of the objectionable conduct is surely sufficient. At issue here is the "deeply rooted and long-standing" (*Gray* v. *Sanders*, 372 U. S. 368, 376 (1963)) policy of the State of New Jersey to subsidize striking employees thereby upsetting the federal labor scheme of free collective bargaining. The State has evidenced "no indication of change" (*Hall* v. *Beals*, 396 U. S. 45, 49 (1969)) in this policy and has continued to automatically disburse the disputed subsidies to future strikers.[8] Manifestly, this deliberate and persistent official policy leaves little uncertainty that the State's conduct raises "a continuing controversy in the federal-state area" (*Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969)) which precludes the conclusion that "the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n.*, 393 U. S. 199, 203 (1968). The termination of the Petitioners' particular labor dispute, accordingly, does not remove the cause of the present action. It is the recurrent availability and payment of welfare benefits to strikers, rather than any of the peculiarities incident to Petitioners' 1971 strike, which is at the crux of this dispute. That issue remains unresolved and certain of recurrence; the challenged state practice has been left "in effect to govern future [labor disputes]." *Gatling* v. *Butler*, 52 F. R. D. 389, 394 (D. Conn. 1971), citing *Gray* v. *Sanders*, 372 U. S. at 375-6. The Respondent Union, accordingly, did

8. As the dissent below correctly observed, "[i]t is clear from the briefs filed on behalf of the public defendants that welfare benefits are still available . . . and that the state has no present intentions of changing its policy . . ." App., p. 67. Indeed, in its argument below, as well as in its memorandum in opposition to the petition for certiorari, the State did not contend the instant matter was moot but, rather, addressed only the merits.

not meet its "heavy burden," as the party urging mootness, of showing that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).[9]

2. Petitioners' continuing nexus with the objectionable conduct is also sufficient to insure that ". . . the issues will be contested with the necessary adverseness and that the litigation will be pursued with necessary vigor . . . " *Flast* v. *Cohen*, 392 U. S. 83, 106 (1968); and see *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). At the outset it is beyond cavil that, even if the instant dispute is narrowly viewed as one confined to the *payment* of welfare benefits to strikers, this is still not a controversy whose resolution could have no possible effect on the Petitioners. Cf. *Atherton Mills* v. *Johnston*, 259 U. S. 13 (1922), and *Doremus* v. *Board of Ed.*, 342 U. S. 429 (1951). The frequency of labor disputes,[10] the established collective bargaining bargaining relationship to which Petitioners are a party (see n. 12, *infra*), and the fact that the Respondent Union has called strikes in the past, demonstrate that the probability of Petitioners involvement in a future strike is substantial. Labor disputes, after all, are more likely than other actions "to be repeated" and preclude "a decision as to . . . legality . . . [from becoming] a futile exercise of jurisdiction." *N. L. R. B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (7th Cir. 1963). Courts, as a result, have frequently adjudicated labor contro-

9. *Atlantic Richfield Co.* v. *Oil Chemical & A. Wk'rs., Int'l., Union*, 447 F. 2d 945, 947 (7th Cir. 1971) ("If past wrongs have been proved [which is all that Petitioners seek to do], and the possibility of future misconduct survives so does the court's power"); and *Avco Corp.* v. *Local, UAW 787*, 459 F. 2d 968, 974 (3rd Cir. 1972). ("If misconduct occurred in the past, and the possibility of its recurrence survives, a case is not moot.")

10. In a typical year, New Jersey will experience 281 work stoppages affecting 114,000 workers who will, under that State's welfare policies, be eligible for benefits. U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in 1971 (Selected Final Tabulations)* June, 1972, p. 42.

versies even after the settlement of the underlying dispute.[11] In fact, since strikes, like pregnancy "often comes more than once" (*Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d at 161 (1973)), there should be no room for doubt that the Petitioners continue to be affected employers. As the First Circuit stated in an identical situation, " . . . nothing in the record suggests the unlikelihood of future repetition." *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 454.

In addition, the Petitioners are separately affected by the continuing *availability* of state welfare assistance to strikers. Such availability necessarily alters Petitioners' continuing collective bargaining relationships.[12] Collective bargaining does not merely involve a once-every-three-years negotiation; it is also a day-to-day process which seeks practical analysis and implementation of the provisions, ambiguities and omissions of a collective bargaining agreement. Collective bargaining, in other words, is a "continuing and developing process . . . [and]

11. See, e.g., *N. L. R. B.* v. *Raytheon Company*, 398 U. S. 25 (1970); *N. L. R. B.* v. *Local 825, Operating Engineers*, 400 U. S. 297 (1970); *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 567 (1958); and *Local 1976, Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958). See also *N. L. R. B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963); *N. L. R. B.* v. *United Hatters*, 286 F. 2d 950 (4th Cir. 1961); *N. L. R. B.* v. *Plumbers Union of Nassau County, Local 457*, 299 F. 2d 497 (2nd Cir. 1962); *N. L. R. B.* v. *Globe Wernicke Systems Company*, 336 F. 2d 589 (6th Cir. 1964); *Pacific Maritime Assn.* v. *Longshoremen*, 454 F. 2d 262 (9th Cir. 1971); *Atlantic Richfield Co.* v. *Oil, Chemical & Atomic Workers Int'l. Union, AFL-CIO*, 447 F. 2d 945 (7th Cir. 1971); *General Dynamics Corp.* v. *Local 5, Shipbuilders*, 469 F. 2d 848 (1st Cir. 1972); and *Avco Corp.* v. *Local 787, UAW*, 459 F. 2d 968 (3rd Cir. 1972). The Third Circuit itself recently reaffirmed this principle. *Printing Pressmen's Union No. 9* v. *Pittsburgh Press Company*, 479 F. 2d 607 (1973).

12. In his dissent below, Judge Gibbons raised various questions as to the actual collective bargaining relationship now in existence where the record, in his opinion, was insufficient. App., pp. 65-72. In order to meet, at least in part, this objection, an affidavit of Harold Finkle, Esq., has been included in the appendix to which is attached the 1971-1974 contract between Petitioners and Respondent Union. App., pp. 141-193. The contract contains a binding grievance-arbitration procedure (App., pp. 163-164) but does not contain a no-strike provision.

not a detached and isolated procedure which, once reflected in a written agreement, becomes a final and permanent result". *N. L. R. B.* v. *Newark Morning Ledger*, 120 F. 2d 262, 267 (3rd Cir. 1941), *cert. den.* 314 U. S. 693 (1941). See also *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 276 (1946); and *Aeronautical Lodge 727* v. *Campbell*, 337 U. S. 521 (1949). The motive power for agreement in this on-going relationship is the same as that which governs contract negotiations: "the availability of economic pressure devices to each [party] to make the other party incline to agree on one's terms" *N. L. R. B.* v. *Insurance Agents' Int'l. Union*, 361 U. S. 477, 489 (1960). Clearly, therefore, as one court concluded in identical circumstances, "knowledge" of the availability of state strike assistance must "influence" a union's position and judgment, not only while such payments are being made but also in anticipation thereof. *Almac's, Inc.* v. *Hackett*, 312 F. Supp. 964, 968 (R. I. 1970).[13] This irremediable "loss in bargaining position" (see *A. F. L.* v. *Watson*, 327 U. S. 582 (1946)) necessarily has an impact which "could be said to be felt immediately by those [employers, like Petitioners] subject to it in conducting their day-to-day affairs." *Toilet Goods Assoc.* v. *Gardner*, 387 U. S. 158, 164 (1967). It is an impact which, in view of the certainty of recurrence of the objectionable action here, should, in and of itself, preclude a finding of mootness. See, e.g., *Division 1287, Bus Employees* v. *Missouri*, 374 U. S. 74 (1963), the sequel to *Oil Workers*, which, as the dissent below observed, ". . . is quite closely in point, for it recognizes

13. Notwithstanding deterrents (see *Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970)), strikes continue to occur with frequency during the term of collective bargaining agreements. The latest figures of the U. S. Department of Labor, Bureau of Labor Statistics, for example, indicate that during 1971, 1,699 work stoppages, or 33.1% of the total number of stoppages, involving over 654,000 workers, were stoppages that occurred during the term of agreements but not in connection with negotiations of new contracts. The workdays lost by such stoppages were a lesser percentage (5.6%) of the workdays lost by all stoppages. U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in 1971 (Selected Final Tabulations)*, June 1972, p. 5.

that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists." App., p. 71.[14]

C. The Instant Case Falls Within the Ambit of the Southern Pacific Doctrine

The substantive issue in this case raises a significant and "continuing controversy in the federal-state area" (*Moore* v. *Ogilvie*, 394 U. S. 814 (1969)). See the discussion at pp. 19-21, *infra*.[15] It is also a question which, in light of the relative brevity of labor disputes compared with the prolonged period necessary to appeal a case to this Court, presents what has been described as a "classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review." *Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d 147,

14. Alternatively, wholly apart from the impact of recurrent strikes, the "self-executing effect" of the availability of the disputed subsidies, coupled with the irreparable nature of the resultant harm, would render the instant action ripe *prior* to the outbreak of any strike. See Davis, *Ripeness of Government Action For Judicial Review*, 68 Harv. L. Rev. 1122, 1138 (1955); and see also *Toilet Goods Assoc.* v. *Gardner*, *supra*; *Gardner* v. *Toilet Goods Assoc.*, 387 U. S. 167, 171 (1967); and *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152 (1967). Indeed, the choice facing an employer, i.e., whether to accede to a union's demands or endure a strike in which the union is assisted by a public subsidy, creates the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories* v. *Gardner*, 387 U. S. at 152.

15. The wide impact of the substantive issue was recognized by the Court of Appeals: ". . . it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae*, of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation." App., p. 59. In fact, the Chamber repeatedly sought to intervene in these proceedings, *inter alia*, to avoid the necessity of considering mootness but was granted only *amicus* status. App., p. 75. Cf. *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 454: "Moreover, the intervening Chambers of Commerce, who have filed their own complaint for declaratory and injunctive relief, represent many other employers in Rhode Island, as to at least some of whom the issue is certain to recur."

161 (1973), quoting *Southern Pacific*. See also *Carroll* v. *Commissioners of Princess Anne County*, 393 U. S. 175 (1968), and *Moore* v. *Ogilvie, supra*. It is of "vital importance" that the brief duration of wrongful conduct not be used to foreclose permanently the "avenues of judicial review" to an entire affected class. *Sibron* v. *New York*, 392 U. S. 40, 51-53 (1968). These principles are applicable, as courts of appeals have recognized on other occasions,[16] to labor controversies. They are also applicable to dispute involving the grant or termination of public assistance. See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); Note, *Mootness On Appeal In The Supreme Court*, 83 Harv. L. Rev. at 1691, n. 87. Indeed, in *I. T. T. Lamp Division*, the case considered dispositive on the merits by the District Court, the First Circuit invoked the same considerations, noting that the

16. See, e.g., *Printing Pressmen's Union* v. *Pittsburgh Press Company*, 479 F. 2d at 609, n. 1 ("Although the underlying disputes between employer and unions have been resolved, and although the unions obtained from this court previously what they were unable to obtain from the district court originally, this appeal is not moot because the issues involved are 'capable of repetition yet evading review.' "); and *Pacific Maritime Association* v. *International Longshoremen's Union*, 454 F. 2d 262, 263-4 (9th Cir. 1971), where the court observed:

> Generally speaking, a case is moot when the issues presented are no longer 'live,' or parties lack a legally cognizable interest in the outcome. *Powell* v. *McCormack*, 395 U. S. 486, 496, 89 S. Ct. 1944, 23, L. Ed. 2d 491 (1969). But an issue remains 'live' unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States* v. *Concentrated Phosphate Export Ass'n., Inc.*, 393 U. S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968). As the District of Columbia Circuit said in *Friend* v. *United States*, 128 U. S. App. D. C. 323, 388 F. 2d 579, 581 (1967): '. . . cases are not made moot by the expiration of orders of brief duration capable of future repetition.'

See also *Solien* v. *Miscell. Drivers and Helpers Union, Local 610*, 440 F. 2d at 127-8: ". . . we believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justiciable cases . . . the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness."

present substantive issue "has vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category where *significant public rights* are involved and court review ought not, if possible, be avoided." 435 F. 2d at 991 (emphasis added). See also *Grinnell Corporation* v. *Hackett,* 445 F. 2d at 454 (". . . a case such as this is not moot, although the particular strike which prompted the suit and the payment of benefits challenged have, as here, terminated by the time of appeal."). A similiar conclusion is warranted in this case. This Court should be particularly "astute to avoid hindrances in the way of taking up" questions involving "the danger of state interference with national [labor] policy . . . It would encourage such interference . . . if a . . . holding of mootness based on the chance event of completion [of a strike] . . . barred this Court's review of . . . [an] adverse decision on the claim of federal preemption." *Liner* v. *Jafco,* 375 U. S. 301, 307 (1964).

D. Oil Workers Is Inapposite

In *Oil Workers,* the Governor of Missouri, pursuant to authority granted by state statute, seized the equipment and facilities of a struck plant and sought an injunction ordering the striking employees to return to work. In opposing the injunction, the striking union unsuccessfully challenged the constitutionality of the underlying statute. On appeal, noting that the injunction had "expired by its own terms," this Court held that there was no controversy before it upon which a decision could be rendered. 361 U. S. at 371.

Oil Workers considered the union's argument only as it contested the validity of the injunction. This Court did not consider the effect of the allegedly unconstitutional statute upon the ongoing collective bargaining process. Indeed, it is questionable whether this broader perspective could have been considered because the constitutionality of the Missouri statute was

raised by the union only by way of answer to the Governor's prayer for injunction. In the instant case, however, by means of a complaint for declaratory judgment, Petitioners have directly placed in issue the constitutionality of the New Jersey welfare-to-strikers policy. This distinction in the methods by which a question is presented is critical. Cf. *Moore* v. *Ogilvie, supra,* with *Brockington* v. *Rhodes,* 396 U. S. 41 (1969).[17] See also *Powell* v. *McCormack,* 395 U. S. 486, 495-498 (1969).

Oil Workers, moreover, also involved merely a speculative possibility of the challenged conduct's recurrence—the objectionable statute had not been invoked for three years and could only be invoked at the discretion of the governor—which precluded entry of a meaningful order. 361 U. S. at 366, 367, 371. As in other similar situations,[18] the absence of a significant probability that the objectionable conduct would recur—rather than the continued standing of a litigant to challenge that conduct—resulted in a finding of mootness. Here, to repeat, the allegedly wrongful policies of the State of New Jersey continue unabated and certain of recurrence.

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17. In *Moore,* this Court rejected a mootness contention in a suit for an injunction and declaratory judgment because the election in which the requirements for a nominating petition were challenged had passed prior to appeal, whereas in *Brockington* a similar mandamus action was held moot. This Court specifically observed that the reason for mootness in *Brockington* was the limited nature of the relief sought and noted that the petitioner there had not sought a declaratory judgment although that avenue was open to him. 396 U. S. at 43. The plaintiff in *Brockington,* in short, had limited his claim to a particular election whereas the *Moore* plaintiff, while asking for an injunction applicable to a specific election, had also indicated a broader adversity as to the ongoing validity of the challenged statute.

18. See, e.g., *A. C. Mechling Barge Line* v. *U. S.,* 368 U. S. 324 (1961) (change in the challenged policies of the I. C. C.); and *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360 (1969) (insufficient possibility that a seizure because of war would recur after the war was concluded).

II

THE NEW JERSEY POLICY OF PROVIDING SUBSIDIES TO STRIKING EMPLOYEES IS AN IMPERMISSIBLE OBSTACLE TO THE ACCOMPLISHMENT OF FEDERAL LABOR POLICY

The issue of state subsidies to striking employees is, as already noted, a recurrent subject of substantial litigation,[19] national controversy[20] and importance.[21] In *ITT Lamp Division*, an almost unprecedented eleven states joined to urge this Court to review this question. The active participation by such a substantial number of states vividly underscores the widespread significance of this issue. The states want this matter resolved. They want to terminate the serious dislocation that presently prevails in the administration of the federal welfare program. They desire a gauge by which to measure the range of permissive state action in the area of labor relations. These

19. See *ITT Lamp Division* v. *Minter, supra; Grinnell Corporation* v. *Hackett, supra; Francis* v. *Davidson,* 340 F. Supp. 351 (Md. 1972), *aff'd per curiam,* 404 U. S. 904 (1972); *Almac's* v. *Hackett, supra; Russo* v. *Kirby,* 453 F. 2d 548 (2nd Cir. 1971); *The Dow Chemical Company* v. *Taylor,* .... F. Supp. ...., 57 F. R. D. 105 (E. D. Mich. *pend.*); *Lascaris* v. *Wyman,* .... N. Y. .... (1973), *cert. den.* 94 S. Ct. 165 (Oct. 9, 1973); and *New York Telephone Company, et al.* v. *New York State Dept. of Labor,* No. 73 Civ. 4557 (S. D. N. Y., *pend.*).

20. Following the Court's summary affirmance in *Francis* v. *Davidson, supra,* for example, the Department of Health, Education and Welfare announced that it would entertain comments from interested parties on a clarification of its regulations as to whether strikers were entitled to AFDC payments. 38 Fed. Reg. No. 1 (Jan. 3, 1973). More than 10,000 responses were received. 77 Daily Labor Report A-7 (April 20, 1973). See also, for the resultant change in the regulations, App., pp. 121-125.

21. The issue is one of importance to every employer and employee whose industrial relations are governed by a collective bargaining agreement (see n. 15, *supra*), as well as to those who must exercise the ". . . difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams,* 397 U. S. 471, 487 (1970). See n. 26, *infra.*

goals cannot by achieved unless this Court provides the requisite guidance.[22]

The major labor preemption problem that previously concerned this Court was to articulate a rule from which the lower courts could determine the limits of their jurisdiction when dealing with labor related matters. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971). The instant case raises a different Supremacy Clause question of a similar, if not greater, magnitude:[23] the permissible extent of state power,

22. Compare, e.g., the position of Iowa in its *amicus* brief in *ITT Lamp Division* in support of the petition for rehearing (p. 3) ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its brief in opposition (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The states, in short, do not now know whether their requisite neutrality in a labor dispute demands the withholding of welfare assistance from strikers (*amicus* brief of Wyoming in support of the *ITT Lamp Division* pet. for reh., p. 4) or whether, conversely, they may provide such benefits since "the asserted conflict involve[s] only a 'tangential frustration' of unfettered collective bargaining." Mass. br. in opp., p. 5.

23. This case does not fall within the rules established by this Court in *Garmon*. See *ITT Lamp Division* v. *Minter*, 435 F. 2d at 992. *Garmon* and its progeny, in contrast to the instant case, dealt principally with the problem of primary jurisdiction, i.e., the jurisdiction of the states over matters "arguably subject" to the jurisdiction of the National Labor Relations Board. It must be noted, however, that even *Garmon* has been the subject of severe criticism. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972). Professor Cox has argued that the *Garmon* doctrine should be accommodated with traditional notions of federal pre-emption by restating that rule so as to disallow any state action which alters the economic balance achieved by Congress, whether or not the state action is directed at conduct "arguably" regulated by the Labor Act. "The occasion seems ripe [he concludes] for a review of the development of, and basic issues in, the law pertaining to Federal occupation of the field of labor disputes." *Id.* at p. 1339. While petitioners do not seek to re-evaluate *Garmon*, they do seek to apply traditional notions of federal pre-emption to non-*Garmon* state interference with federal labor policy.

albeit perhaps directed at non-labor objectives, to alter the collective bargaining process. This question also warrants resolution.

A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme

The process chosen by Congress to promote economic stability and minimize industrial strife is unfettered collective bargaining. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959). The use of economic sanctions is at the core of this federal scheme. *N. L. R. B.* v. *Insurance Agents Union, supra; H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). "The degree of economic power the parties possess" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. at 489), rather than the "Government, control[s] the results of the negotiations." *Id.* at 488. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Shipbuilding Co.* v. *N. L. R. B.*, 380 U. S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, has heretofore found that for a state "[t]o restrict either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959)], or the forms of pressure which are permissible [see *Teamsters, Local 20* v. *Morton*, 377 U. S. 252 (1964)] tips the scale towards management or union." See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. at 1353. In *Oliver*, this Court explained (358 U. S. at 296):

> Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

See, to the same effect, *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398, 208 N. E. 2d 516 (1965).[24] The controlling principle, in short, is that where state action may have a coercive effect, whether direct or indirect, upon the parties to a labor dispute, it is prohibited by the overriding federal policy.[25] See, e.g., the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion upon the federally protected process of free collective bargaining. *General Elec-*

24. After a careful analysis in the *John Hancock* case, the Supreme Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event of a strike by an insurance company's collecting agents, the court stated:

> For the state to intrude into such an area [collective bargaining] designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts. 349 Mass. at 398; 208 N. E. 2d at 524-525.

25. This principle of governmental neutrality, although prohibiting subsidies to strikers in this instance, applies equally well to employers. A state could not aid an employer during a labor dispute by subsidy, or by requiring an unemployed individual to take work at a struck plant. The California Supreme Court in *Matson Terminals, Inc.* v. *California Employment Commission*, 24 Cal. 2d 695, 707 (1944), stated the principle well in construing the California unemployment compensation law:

> The Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a), is balanced by the provisions that *other unemployed workers* shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits. (§ 13(b)(1)). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strike breaker. (emphasis supplied).

The New Jersey courts and legislature have enunciated a similar principle. See *Ablondi* v. *Board of Review*, 8 N. J. Super. 71, 76 (App. Div. 1950); *Westinghouse Elec. Corp.* v. *Board of Review*, 25 N. J. 221 (1957); and App., pp. 136-140.

tric Company v. *Callahan*, 294 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir., 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich., 1955). The grant of substantial direct financial assistance to one party to a labor dispute,[26] of course, presents an even clearer instance of improper state action; the state has created a ". . . potent [and prohibited] weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces." *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. at 398; 208 N. E. 2d at 524. Cf. *Cab Operating Corp.* v. *City of New York*, 243 F. Supp. 550, 552 (S. D. N. Y., 1965); and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (Del. 1967).

B. State Interest Cannot Legitimize An Intrusion Upon Federal Law

The District Court's reliance upon *I. T. T. Lamp Division* for the proposition that a state interest may foreclose consideration of a preemption claim can only be described, in words of

26. The magnitude of public assistance to strikers cannot be gainsaid. The only comprehensive compilation of data in this area (Thieblot and Cowin, *Welfare and Strikes: The Use Of Public Funds to Support Strikers*, Industrial Research Unit, University of Pennsylvania Press (1972); see also the admitted affidavit of Dr. Herbert Northrop, App., pp. 75-104), for example, shows, *inter alia*, these significant facts:

(1) Workers may receive 80-90% or more of their working income through public funds while on strike (Thieblot and Cowin, *supra*, at pp. 101, 148, 200);

(2) Payments of $300-$350 per month in public funds are commonplace (*id.* at 100, 142, 199-200);

(3) 50% or more of a work force may receive public funds during a strike (*id.* at 106);

(4) The estimated total public funds to be expended for the benefit of strikers during calendar 1973 is nearly $304 million dollars (*id.* at 193); and

(5) Public welfare assistance has played a major role in at least two major strikes in New Jersey (*id.* at 143-150).

this Court, as an "aberrational doctrine." *Perez* v. *Campbell*, 402 U. S. 637, 651-652 (1971). Heretofore it has been clear that once it has been shown that a state statute may stand "as an obstacle to the full effectiveness of a federal statute . . ." (*The Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U. S. 714, 722 (1963)), or "clashes" directly or indirectly with the "objectives" of federal policy (*Sears, Roebuck and Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964)), such interference by the state is prohibited. Neither the similarity nor difference between the objectives of state and federal law (see *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141-142 (1963); and *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955)) nor the "relative importance to the State of its own law is . . . material." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). These precepts are equally applicable in the field of labor relations. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 244, where this Court observed that it does not matter "whether the States have acted through laws of broad application rather than laws specially directed towards governance of industrial relations"; *Motor Coach Employées* v. *Missouri*, 374 U. S. 74, 80-81 (1963), where the use of "emergency legislation", passed "to protect the public from threatened breakdowns in vital community services", was prohibited; and *Delaware Coach* v. *Public Service Commission, supra.* The District Court by holding, in effect, that the state interest here was paramount, disregarded these principles.

C. Assuming Arguendo That the New Jersey Policy Is Not Prohibited As a Matter of Law, a Demonstration That Substantial Subsidies Are Available to Striking Employees Constitutes a Prima Facie Showing of an Impermissible Obstruction of Free Collective Bargaining

Assuming *arguendo* that a factual determination is found necessary to determine whether federal policy is obstructed by the payment and/or availability of state welfare assistance to

strikers, the administration of justice will be best served if this Court clarifies the applicable evidentiary standards that must be satisfied to demonstrate that ". . . a State [has] imping[ed] on the area of labor combat designed to be free. . . ." *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953). At present, while cases across the nation have questioned the type of state policies at issue here, the sole authorities, providing any guidance as to the evidentiary question, are so complex, confusing and prohibitively expensive to implement as to virtually permit federal policy to be frustrated by default. See *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457-461, and *I. T. T. Lamp Division* v. *Minter*, 435 F. 2d at 993-4. Recently this Court, in another situation, defined the applicable rules that should prevail during a trial on remand. *McDonnell-Douglas Corp.* v. *Green*, ... U. S. ....., 36 L. Ed. 2d 668 (1973). A formulation of the appropriate preemption test to govern the trial of this case is equally necessary.

In prior cases, when this Court has concluded that a state policy improperly tips the scale towards management or union, it has not required any empirical evidence, let alone the "macrocosmic" and "complex" record required by *Minter* and *Grinnell*. In *Morton*, for instance, where this Court invalidated a state law even though the particular conduct it regulated was not arguably proscribed or protected by federal law, i.e., a non-*Garmon* situation, the plaintiff was not required to demonstrate by any "macrocosmic" standard that the objectionable activities interfered with the bargaining process. This Court, indeed, has inferred, *without evidence*, that certain restraints have a "direct tendency to frustrate" federal policy and that financial pressure influences human conduct. See, e.g., *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967). Accord: *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance, supra; Delaware Coach* v. *Public Service Commission, supra.*[27] It is precisely

27. See also the various cases in which publicity by state boards of conciliation have been held to be an impermissible intrusion, again without empirical evidence, upon the federally protected process of

such an inference which, Petitioners submit, should be drawn in the instant matter upon a demonstration, as is already apparent, of significant financial inducements offered by the state to striking employees.

The inference that even moderate financial penalties or benefits will generally alter the course of human conduct permeates our entire legal system. For example, a common feature of the entire criminal law system is the use of financial penalties to deter illegal conduct. The courts and the National Labor Relations Board have similarly recognized that even subtle conduct by either unions or employers might be read as a financial threat or inducement that will alter a worker's vote.[28] Indeed, Congress has incorporated such an inference into the entire welfare scheme.[29] Finally, and perhaps even more significant, is this Court's recognition that financial pressures will deter a man from choosing to cross a picket line and returning to his job—the very issue at bar.[30] Thus, to hold that significant state subsidies to strikers constitute a *prima facie* demonstration of an improper intrusion upon federal labor policy comports

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free collective bargaining. *General Electric Company* v. *Callahan*, 294 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1966).

28. See, e.g., *N. L. R. B.* v. *Savair Mfg. Co.*, 470 F. 2d 305 (6th Cir. 1972), *cert. granted*, 36 L. Ed. 2d. 683 (1973); and *N. L. R. B.* v. *Exchange Parts Co.*, 375 U. S. 405 (1964).

29. In 1967, Congress amended the welfare laws (42 U. S. C. § 602; App., p. 112) to provide an incentive to work. In essence, the first $30 a man earned and 30% of every additional dollar was not deducted from his welfare check. These moderate amounts were described as providing for "the first time . . . the encouragement to take a job" (113 Cong. Rec. S. 32852 (Nov. 16, 1967)—comment of Sen. Ribicoff), and of "paramount importance [in providing] an incentive . . . to seek work." (113 Cong. Rec. 423102 (Aug. 17, 1971)—comments of Rep. Feighan). See 2 U. S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967), pp. 2834, 2994.

30. See *N. L. R. B.* v. *Granite State Joint Bd.*, 409 U. S. 213 (1972).

with a basic assumption of our legal system. If federal supremacy is to be meaningful, the burden must be borne by the state to demonstrate that the normal course of human conduct is, for some heretofore inexplicable reason, inoperative in a strike situation.

CONCLUSION

For each of the foregoing reasons, Petitioners respectfully request that this Court (1) reverse the Court of Appeals and (2) reverse the District Court on the merits. Alternatively, Petitioners submit that the administration of justice would be served if this Court provides evidentiary guidelines in this important area of federal-state relations.

Respectfully submitted,

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